

United States District Court
Eastern District of California

Marvellous Asha Xyah,

Plaintiff,

vs.

Irene Ceballos, et al.,

Defendants.

No. Civ. S 05-0923 LKK PAN P

Findings and Recommendations

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Plaintiff is a state prisoner without counsel prosecuting a civil rights action. Plaintiff seeks leave to proceed in forma pauperis.

Section 1915(g) provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

1 28 U.S.C. § 1915(g).

2 This action would "commence," for the purposes of § 1915(g)
3 analysis, when this court grants permission to proceed in forma
4 pauperis.¹ On three prior occasions, actions brought by
5 plaintiff (under his former name) in this court have been
6 dismissed as frivolous, malicious, or failing to state a claim.
7 See Greene v. Reyes, Civ. S 00-0196 LKK DAD P; Greene v. State of
8 California, Civ. S 02-2398 FCD PAN P; Greene v. California Dept.
9 of Corrections, Civ. S 04-1217 DFL KJM P. Plaintiff makes no
10 showing he is under imminent danger of serious physical injury.

11 Accordingly, the court hereby recommends plaintiff's request
12 to proceed in forma pauperis be denied and plaintiff be required
13 to pay the filing fee.

14 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
15 findings and recommendations are submitted to the United States
16 District Judge assigned to this case. Written objections may be
17 filed within 20 days of service of these findings and
18 recommendations. The document should be captioned "Objections to
19 Magistrate Judge's Findings and Recommendations." The district

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24 ¹ Section 1915(a)(1) requires plaintiff seek an order authorizing
25 "commencement" of a suit in forma pauperis. "Bringing" and "commencing" suit
26 are the same thing. Black's Law Dictionary, Rev'd. 4th ed. (1968) p. 335 ("To
'bring' a suit is an equivalent term; an action is 'commenced' when it is
'brought' and vice versa.") Therefore, this action did not "commence" until
the court granted plaintiff authority to proceed in forma pauperis.

1 judge may accept, reject, or modify these findings and
2 recommendations in whole or in part.

3 So ordered.

4 Dated: December 27, 2005.

5 /s/ Peter A. Nowinski

6 PETER A. NOWINSKI

7 Magistrate Judge
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